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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1476

EMMETT J. STEBBINS,

Petitioner,

v.

ALLSTATE INSURANCE COMPANIES

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMMETT J. STEBBINS,
Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Emmett J. Stebbins, respectfully prays that a writ of certiorari issue to review the orders of the United States Court of Appeals for the District of Columbia, entered in this proceeding on February 4, and 27, 1974.

OPINIONS BELOW

There was no formal opinion of the District Court, or the Appellate Court. The District Court entered the following orders –

December 14, 1971:

> This matter came before the Court upon the motion of Defendant Allstate Insurance Company to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted and the Court having considered the arguments raised in said motion as well as the arguments raised in Plaintiff's Opposition to said motion, Defendant Allstate Insurance Company's reply to said Opposition and Plaintiff's supplemental opposition, it is hereby
>
> ORDERED that the motion of Defendant Allstate Insurance Company is granted and Plaintiff's complaint be, and the same hereby is, dismissed for failure to state a claim upon which relief can be granted.

February 2, 1972:

> Upon consideration of the Motion of plaintiff to vacate order dismissing complaint against Allstate Insurance Companies filed herein, December 17, 1971, it is this 2nd day of February, 1972
>
> ORDERED that the Motion be and the same hereby is denied.

April 24, 1972:

> This matter came before the Court upon the motion of Defendant Equal Employment Opportunity Commission to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted and the Court having considered the arguments raised in support of said motion as well as the arguments raised in Plaintiff's Opposition to said motion, it is hereby
>
> ORDERED that the motion of Defendant Equal Employment Opportunity Commission is granted and Plaintiff's complaint be and the same hereby is, dismissed for failure to state a claim upon which relief can be granted.

Plaintiff appealed to the United States Court of Appeals for the District of Columbia. The Appellate Court entered its order May 19, 1972 –

> On consideration of appellant's motion for summary reversal and remand of case for trial, and of the responsive pleadings filed with respect thereto, it is
>
> ORDERED by the Court that appellant's aforesaid motion is held in abeyance pending this Court's decision in Stebbins v. Keystone Insurance Company, No. 24658, argued on October 22, 1971.

July 24, 1973:

> On consideration of appellant's motion for summary judgment and remand of the

case for trial, and of appellant's suggestion to the Court, it is

ORDERED by the Court that the above case is remanded to the District Court for proceedings not inconsistent with this Court's decision in Emmett J. Stebbins v. Keystone insurance Co., et al., No. 24,658 (D.C. Cir. June 5, 1973).

Subsequent to reversal and remand with directions by the Appellate Court, the District Court entered the following rulings, in violation of Rule[1] 12(a)(1), Federal Rules of Civil Procedure:

The Motion to Dismiss of the Defendant Allstate Insurance Company having been considered by the Court, it is, without hearing pursuant to Local Rule 9(f), this 14th day of September, 1973,

ORDERED:

That the Motion to Dismiss of the Defendant Allstate Insurance Company be and is hereby granted; and

IT IS FURTHER ORDERED

That the Complaint be and is hereby dismissed.

---

1 "A defendant shall serve his answer . . . (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; . . ."

October 19, 1973:

> Upon consideration of the Motion of Plaintiff to Alter or Amend Order entered September 14, 1973, filed herein, September 21, 1973, it is this 19th day of October, 1973,
>
> ORDERED that the Motion be and the same hereby is denied.

November 27, 1973:

> This matter came before the Court upon the motion of Defendant Equal Employment Opportunity Commission to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted and the Court having considered the arguments raised in support of said motion as well as the arguments raised in Plaintiff's Opposition to said motion, it is hereby
>
> ORDERED that the motion of Defendant Equal Employment Opportunity Commission is granted and Plaintiff's complaint be and the same hereby is, dismissed for failure to state a claim upon which relief can be granted.

Plaintiff appealed to the Appellate Court to enforce its mandate,[2] issued August 14, 1973, pursuant to Rule 41,

---

2 "The question of damages and attorney's fees must also be considered, since the trial court rested its judgment

(Cont'd)

F.R.A.P. The Appellate Court promulgated its orders which are in derogation of the principles[3] of law enounced by the United States Supreme Court:

February 4, 1974:

> On consideration of appellant's motion for summary reversal, of the opposition thereto, of appellant's motion to consolidate with No. 73-2180, and appellant's pro se petition for mandamus to enforce mandate of this Court, it is
>
> ORDERED by the Court that appellant's aforesaid motions (1) for summary reversal, (2) to consolidate, and (3) for mandamus are denied, and it is

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(Footnote 2 Cont'd)

> disallowing such compensation on the assumed fact of Stebbins' unemployability." Footnote 23, *Stebbins v. Keystone Insurance Company* (C.A.D.C., 1973), ___ U.S. App. D.C. ___, 481 F.2d 501.

[3] *In Re Sanford Fork & Tool Company* (1895), 160 U.S. 247, at 255. The Court asserted that if the district court mistakes or misconstrues the judgment of the appellate court, and does not give full effect to "the mandate, its action may be controlled, either upon a new appeal . . . or by a writ of mandamus to execute the mandate." *Annotation:* 98 L.Ed. 114, at page 129, Section 19.

Newman v. Piggie Park Enterprises, Inc. (1968), 390 U.S. 400. The court allowed attorney's fees to the prevailing party, in construing Section 204(b), 78 Stat. 244, which contains similar statutory language as Section 2000e-5(k), 42 U.S.C.

McDonnell Douglas Corporation v. Percy Green (1973), 411 U.S. 792, 36 L.Ed. 2d 668. Defining the guidelines for trial of Title VII, Civil Rights Cases.

FURTHER ORDERED by the Court, sua sponte, that the order of the District Court appealed from herein be, and the same hereby is, affirmed.

February 27, 1974:

On consideration of appellant's motion to reconsider *en banc* the order of this Court dated February 4, 1974, affirming the order of the District Court, it is

ORDERED by the Court that the aforesaid motion is denied.

JURISDICTION

The order of the United States Court of Appeals for the District of Columbia was entered February 4, 1974; and an order denying Petitioner's Motion to Reconsider En Banc was entered February 27, 1974. See, *Opinions Below, supra.* Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

Subsequent to reversal and remand with directions, by the Appellate Court, whether or not the trial court's failure to require Allstate Insurance Companies and the Equal Employment Opportunity Commission, pursuant to Rule 12(a)(1), Federal Rules of Civil Procedure, to file and serve their *answer,* deprived petitioner of *procedural due process* of law?

or

Whether or not a motion to dismiss, or a motion for summary judgment, is considered a *responsive pleading*[4] within the meaning of Rule 12(a)(1) of the Federal Rules of Civil Procedure?

STATUTES INVOLVED

42 U.S.C. 1981: All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. 2000e-3(a): It shall be an unlawful employment practice for an employer to discriminate against any . . . applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

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[4] See, 37-A *Words & Phrases 56*, and *Cumulative Annual Pocket Supplement*. See also, Rule 7(a), Federal Rules of Civil Procedure.

FIFTH AMENDMENT, U.S. Constitution:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

RULES INVOLVED

Rule 12(a)(1), F.R.C.P.:

> A defendant shall serve his answer . . . (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; . . .

Rule 27(c), F.R.C.P., Equitable Bill of Discovery:

> This rule does not limit the power of a court to entertain an action to perpetuate testimony.

Rule 34(c), F.R.C.P., Equitable Bill of Discovery:

> This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

STATEMENT OF THE CASE

Circa July 30, 1970, petitioner filed an application for writ of certiorari in this Court – *Stebbins*[5] *v. Allstate Insurance Companies*, Misc. 5361, to review the Judgment

[5] This case involved a violation of Section 2000e-2(a) of Title 42 United States Code, Section 703(a), 78 Stat. 255.

(no opinion) of the U.S. Court of Appeals for the District of Columbia entered May 19, 1970, affirming the order of the United States District Court for the District of Columbia, Civil Action numbered 2484-69. Certiorari denied November 9, 1970, 400 U.S. 909.

Subsequent to denial and prior to instituting the present proceedings,[6] petitioner sought employment opportunities with Allstate Insurance Companies, as a claims adjuster, in their offices situated in the District of Columbia, Commonwealth of Virginia, States of Maryland, West Virginia, and Delaware. Allstate retaliated, asserting in a letter[7] addressed to petitioner, dated June 28, 1971 –

> "Judging by previous correspondence and your past conduct, and in view of the litigation which you have initiated against other companies, we have concluded that . . . we can see no purpose in replying to your letters or in conducting any further correspondence with you."

A timely administrative complaint was filed with the Equal Employment Opportunity Commission, which is presently pending. Upon request or demand by petitioner, the Commission issued the statutory notice of right to sue. Petitioner filed a judicial complaint on behalf of himself and others similarly situated in the United States District Court for the District of Columbia, September 2, 1971, alleging, *inter alia*, that Allstate denied petitioner and members of his class the "same right . . . to make and enforce

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[6] Retaliation provision, Section 2000e-3(a), 42 U.S.C., Section 704(a), 78 Stat. 257; and the Civil Rights Act of 1866, 42 U.S.C. 1981.

[7] See Record, United States District Court, D. C., Complaint filed September 2, 1971, Allegation No. I(f).

contracts . . . as is enjoyed by white citizens," and that Allstate had retaliated against petitioner, individually "as the result of filing a charge under Title VII of the Civil Rights Act of 1964, Allstate Insurance Companies denied plaintiff employment opportunities." The Equal Employment Opportunity Commission[8] (hereinafter referred to as the Commission or EEOC) was joined as a non-party for the purpose of supplying testimony[9] and documentary[10] evidence and if needed to protect the class interest. After service of process upon all defendants-respondents and prior to expiration of time within which to file their answers (responsive pleadings), Allstate[11] and EEOC[12] filed motions

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[8] 28 U.S.C. 1361, provides that –

> The district courts shall have original jurisdiction of any action in nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. 76 Stat. 744.

[9] See, Rule 27(c), F.R.C.P., Rules Involved, *supra.*

[10] See, Rule 34(c), F.R.C.P., Rules Involved, *supra.*

[11] Allstate's Motion to Dismiss: September 23, 1971 –

> "1. The claim set forth in the Complaint is barred by the doctrine of collateral estoppel.
>
> 2. The Complaint is frivolous and totally without merit and was filed in bad faith.
>
> 3. The Complaint fails to state a claim upon which relief can be granted."

[12] EEOC's Motion to Dismiss:

> "1. To dismiss the action because the complaint fails to state a claim against defendant, EEOC, upon which relief can be granted.

(Cont'd)

to dismiss the verified complaint (demurrers, or pleas in confession and avoidance[13]). On September 27, 1971, petitioner-plaintiff filed and served upon Allstate a list of questions or interrogatories, which are presently pending, that is to say, not replied[14] to by EEOC or Allstate. Without hearing or oral argument, the trial court dismissed the verified complaint. See, *Opinions Below, supra.* Allstate and EEOC made no application to the District Court for extension of time within which to file their answers (responsive pleadings) to the verified complaint, pending review by the Appellate Court of the District Court's order of dismissal.

On appeal to the Appellate Court of the United States for the District of Columbia, by petitioner-plaintiff, the Appellate Court reversed and remanded with directions,[15] Order of July 24, 1973. See, *Opinions Below, supra.* The

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(Footnote 12 Cont'd)

> 2. To dismiss the action on the ground that the court lacks jurisdiction over the EEOC because Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, *et seq.*, exempts any United States agency from coverage of the Title."

13 Rule 8(c), F.R.C.P.

14 See, Recommendation of Pretrial Examiner, November 19, 1971, which reads in pertinent part –

> "Recommended that defendant Allstate's motion to extend the time to answer said interrogatories until after disposition of the pending motion to dismiss be granted, and that Allstate have to and including twenty days after any denial of said motion within which to file answers or objections to said interrogatories."

15 See, Footnote 2, *supra.*

mandate, rescript or remittitur of the Appellate Court for the District of Columbia, August 21, 1973. Instead of filing and serving their answers to the verified complaint, within 10 days thereof, Allstate[16] and EEOC[17] filed and served the same motions to dismiss, predicated upon the same grounds rejected by the Appellate Court. Petitioner-plaintiff opposed the motions to dismiss, or "pleas in confession and avoidance" on the ground that "motions to dismiss and motions for summary judgment" are not "responsive pleadings" within the meaning of the Rules 12(a)(1), and 7(a) of the Federal Rules of Civil Procedure. See, 37-A, *Words & Phrases 56*, and *Cumulative Annual Report Supplement*. Petitioner appealed to the Appellate Court and the Appellate Court affirmed the second order of dismissal of the District Court. See, Orders entered February 4, and 27, 1974, *Opinions Below, supra.*

REASONS FOR GRANTING THE WRIT

(A)

Conflict with other decisions: The Fourth Circuit held in *Cox v. Babcock & Wilcox Company* (1972), 471 F.2d 13, at page 16, that the dismissal of an individual litigant's complaint[18] where class relief had been sought did not require dismissal of the class action, even though there was

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[16] See, Footnote 11, *supra.*

[17] See, Footnote 12, *supra.*

[18] See, Complaint, U.S.D.C., D. C. –

> "That plaintiff complains on behalf of himself and all others who may intervene and seek relief, and contribute to the expenses of this action, and for cause of action alleges: . . .

not a proper representative to maintain the suit. In the instant proceedings the Equal Employment Opportunity Commission is a proper[19] representative. This can be accomplished by re-arranging the party-litigants. This is to say, the EEOC can be made a party-plaintiff, pursuant to the equity powers of this Court. The Fourth Circuit remanded the class-action to the trial court for it to be maintained on the docket "for a reasonable time" to permit the presentation of any appropriate claims for relief under the class-action.

The Fifth Circuit held in *Pettway v. American Cast Iron Pipe Company* (1969), 411 F.2d 998, construing 42 U.S.C. Section 2000e-3(a), that an employer must respond in damages for retaliating against an employee who had pursued or asserted his statutory rights under Title VII of the Civil Rights Act of 1964, as amended March 24, 1972, Public Law 92-261, 86 Stat. 103.

The Seventh Circuit determined or decided in *Bowe v. Colgate-Palmolive Company* (1969), 416 F.2d 711, at 719 –

> A suit for violation of Title VII is necessarily a Class action as the evil sought to be ended is discrimination on the basis of a Class characteristic, *i.e.*, race, sex, religion or national origin. In our view, it is indistinguishable on this point from actions under Title II relating to discrimination in accommodations.

The issue raised by this conflict is of continuing importance and should be resolved by this Court.

---

[19] See, Footnote 8, *supra.*

(B)

Deprivation of substantive and procedural due process of law: The failure of the courts below to require Allstate and EEOC to file "responsive pleadings" (Answers) within 10 days subsequent to entry of the Appellate Court's Mandate, August 21, 1973, prior to renewal or filing their same motion to dismiss (demurrer, or pleas in confession and avoidance) is repugnant to constitutional restraints of the Fifth Amendment, and the enabling provisions of the Rules of Civil Procedure, 28 U.S.C. 2072. The guaranty of due process found in the Fifth Amendment declares that no person shall "be deprived of life, liberty, or property without due process of law." The enabling Act reads in significant part that "such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial" by jury[20] as at common law and as declared by the Seventh Amendment to the Constitution. Petitioner does not complain of the Rules *per se*, but the construction and application of the Rules (Rule 12(b); failure to enforce Rule 12(a)(1)).

When a motion to dismiss is used or employed as the equivalent of a demurrer to test the legal sufficiency of pleadings, it is obvious to anyone who can read, write, or cipher (except code-pleaders) that the court is called upon merely to determine a question of law – no question of fact is presented. For the purpose of the motion, the court is confined to the pleadings. See, *Polk Company v. Glover*, (1938), 305 U.S. 5, at page 9:

> "Defendants' motion to dismiss like the demurrer for which it is a substitute (Equity Rule

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[20] *Curtis v. Loether, et al.* (February 20, 1974), Case # 72-1035, ___ U.S. ___, ___ S. Ct. ___, __ L.Ed. 2d ___.

> 29) was addressed to the sufficiency of the allegations of the bill. For the purpose of that motion, the facts set forth in the bill stood admitted."

In the proceedings at hand, the courts below were confined to the complaint and were not at liberty to consider the affidavits or other evidence upon the application for an order to dismiss the complaint. No question is ordinarily before the courts below as to the admissibility or consideration of evidence to support those pleadings. Where a vital and undetermined issue of fact – "retaliation, and denial of right to make and enforce contract" – are presented herein by the pleadings, a judgment should not be permitted to rest on an issue of law alone, without an evidentiary hearing.

In May 1973, this Court had an opportunity to define the guidelines for trial of Title VII cases. This Court has not defined the guidelines for Section 1981, 42 United States Code, cases. *McDonnell Douglas Corp. v. Percy Green* (1973), 411 U.S. 792, 36 L.Ed. 2d 668. The courts below disregarded the principles promulgated by this Court in the aforementioned case.

CONCLUSION

For the foregoing reasons, the writ should be granted to resolve the conflict in the circuits, and to enunciate the guidelines for trials of Section 1981 cases.

Respectfully submitted,

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